

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 5/15/2020
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THE LEGAL AID SOCIETY,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,

Defendant.
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20-cv-2283 (LJL)

ORDER

LEWIS J. LIMAN, United States District Judge:

As discussed at the conference today, the following is HEREBY ORDERED:

1. On the day the United States Department of Housing and Urban Development (“HUD”) makes its determination with respect to Plaintiff’s fee waiver request, counsel for HUD shall file a letter electronically on ECF advising the Court that a decision has been made and attaching a copy of that decision.
2. The Government represented that a decision on Plaintiff’s fee waiver request will be made and conveyed no later than May 27, 2020. Accordingly, by no later than 5:00 p.m. on May 29, 2020 or 5:00 p.m. two business days after HUD makes its decision on the fee waiver—whichever is earlier—Plaintiff shall submit a letter-brief setting forth any arguments for the Court to consider with respect to HUD’s decision and any relief requested with respect to that issue. No later than 5:00 p.m. three business days following Plaintiff’s submission, HUD shall file an opposition. No later than two business days following the submission of HUD’s opposition, Plaintiff shall file a reply.
3. A telephonic status conference and argument with respect to the issue of the fee waiver request is SET for June 8, 2020 at 3:00 p.m. Parties are directed to call (888) 251-2909 and use access code 2123101.
4. The Government represented that HUD would complete the review of 8,000 documents reflecting communications between HUD and the White House by June 12, 2020,¹ but that it could not commit to a date for the production of those documents or any documents exchanged with the White House because the documents required review for executive privilege and HUD had no control over when the White House would review the documents. The Government has the right to withhold documents subject to a valid claim of executive privilege, but the Government here seems to be claiming that it has an

¹ The Court orders HUD to complete the review of the 8,000 documents by June 12, 2020.

open-ended right to defer production of documents until whenever the White House decides to undertake and complete the executive privilege review. The Court needs legal briefing on this issue. Accordingly, by no later than 5:00 p.m. on May 20, 2020, the parties shall submit letter-briefs addressed to the question whether the Court may order an agency sued under FOIA for its failure to timely respond to a FOIA request to produce responsive documents responsive to a FOIA request by a date certain notwithstanding that the documents must, before production, undergo executive privilege review with the White House. The question, in effect, asks whether a court may impose a time limit on executive privilege review.

5. The Government also and separately represented that it would not be able to review and process the remaining 2,000 or so HUD-White House documents during the period from approximately June 12, 2020, to July 15, 2020, because of a migration of its review platform from one system to another. In addition, the Government represented that during that migration from one platform to another, HUD would cease the review of any documents requested pursuant to FOIA by any requestor for a period of at least one month (and perhaps longer depending on the time the migration takes). Accordingly, the letter briefs to be submitted by no later than 5:00 p.m. on May 20, 2020 shall also address the question whether it is lawful for an agency subject to FOIA to cease its review and production of all documents required to be produced pursuant to FOIA for a period of a month or longer.
6. No later than 5:00 pm. on May 20, 2020, counsel for HUD shall submit a particularized affidavit, or affidavits, from someone or persons with knowledge, supporting the proposition that approximately 2,000 documents relating to HUD communications with the White House cannot be reviewed by June 12, 2020 without causing technological system shut-down.

SO ORDERED.

Dated: May 15, 2020
New York, New York

A handwritten signature in black ink, appearing to read 'L. Liman', written over a horizontal line.

LEWIS J. LIMAN
United States District Judge